**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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|---|---|---|
| **JAIME CASTILLO** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No. 1,028,134 |
| **CASTLE CONSTRUCTION, LLC** | ) | |
| Respondent | ) | |
| AND | ) | |
| | ) | |
| **TRAVELERS INDEMNITY COMPANY** | ) | |
| Insurance Carrier | ) | |

## ORDER

Respondent and its insurance carrier appealed the June 6, 2006, preliminary hearing Order entered by Administrative Law Judge John D. Clark.

## ISSUES

Claimant alleges that on February 13, 2006, he injured his back unloading siding into a storage box at a work site. In the June 6, 2006, Order, Judge Clark found that claimant's accident arose out of and in the course of his employment with respondent. Consequently, the Judge awarded claimant both temporary total disability and medical benefits.

Respondent and its insurance carrier contend Judge Clark erred. They argue claimant failed to prove he was an employee of respondent at the time of the accident. But if claimant is an employee, they contend claimant's accident did not arise out of and in the course of his employment as the work he was doing when injured was not related to his employment. They next argue claimant's back symptoms are from a chronic condition and that claimant did not aggravate his back problem at work. Finally, they assert claimant has no credibility. In short, respondent and its insurance carrier request the Board to deny claimant's request for workers compensation benefits.

Claimant did not file a timely brief with the Board and, therefore, the Board does not have the benefit of his argument. Presumably, claimant would request the Board to affirm the June 6, 2006, Order.

The issues before the Board on this appeal are:

1. Did claimant injure or aggravate his low back on February 13, 2006?

2. If so, did that injury or aggravation arise out of and in the course of employment with respondent?

3. If so, did claimant work for respondent as an independent contractor or as an employee?

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the arguments of respondent and its insurance carrier, the Board finds and concludes:

Claimant testified he injured his low back on February 13, 2006, while unloading siding from a delivery truck. At the time of the alleged accident, respondent employed claimant to install siding. Claimant has worked for respondent for three or four years.

The alleged accident occurred at the work site where respondent had a contract to install siding on numerous four-plexes. Although unloading siding was not a regular part of claimant's job duties, claimant explained he helped unload the siding as he was waiting for the siding to arrive so he could resume his work.

> Q. (Mr. Stalcup) Well, did you typically do that [unload siding], often do it, first time you ever did it?
>
> A. (Claimant) Oh, did it a couple times.
>
> . . . .
>
> Q. Okay. And why were you unloading siding at that particular time from the truck?
>
> A. Because we didn't have nothing else to do, we was waiting on our materials and we was helping unload it so we can get our siding so we can start going back to work.[1]

Claimant testified he notified respondent's owner, Terry Antalek, of his low back injury the same day it occurred. Claimant then sought medical treatment with Dr. Mark S. Dobyns, whom claimant described as respondent's workers compensation doctor. From

[1] P.H. Trans. at 10.

the medical records introduced at the preliminary hearing, it appears claimant first saw the doctor on February 16, 2006, and reported that he had injured his back *loading* siding three days earlier. The doctor diagnosed a lower thoracic/upper lumbar sprain and recommended several days of rest. Later, the doctor prescribed physical therapy. Fortunately, claimant's back complaints have mostly resolved. Consequently, claimant does not believe he needs any additional medical treatment at this time.

The Judge concluded claimant injured his back working for respondent. The Board agrees. That conclusion is supported by the medical records and claimant's testimony.

The Judge also determined claimant was working for respondent as an employee at the time of his back injury. And the Board agrees. Claimant worked for respondent on an ongoing basis for a period of several years. Although claimant provided his own hammer, nail pouch, and drill, respondent furnished a nail gun, compressor, hoses, and ladders. Claimant did not furnish the materials that he used in his work. Respondent was not withholding taxes from claimant's checks at the time of the accident. But it appears that was done merely to help claimant by paying him more money. Claimant did not operate as an independent business or independent contractor. Furthermore, respondent paid claimant on an hourly basis rather than upon piecemeal bids.

Finally, the Board affirms the Judge's finding that claimant's accident arose out of and in the course of his employment with respondent. The evidence fails to establish at this juncture of the claim that helping unload the siding that was delivered to the work site was prohibited work. The Judge observed both claimant and Mr. Antalek testify. The Judge apparently believed claimant's testimony that indicated respondent did not prohibit him from unloading the siding at the work site. Moreover, helping unload the siding furthered respondent's business interests as the material was needed before claimant could resume his work.

In conclusion, the preliminary hearing Order should be affirmed.

As provided by the Workers Compensation Act, preliminary hearing findings are not final but, instead, those findings may be modified upon a full hearing of the claim.[2]

**WHEREFORE**, the Board affirms the June 6, 2006, Order entered by Judge Clark.

**IT IS SO ORDERED.**

[2] K.S.A. 44-534a.

Dated this ____ day of July, 2006.

BOARD MEMBER

c: Randy S. Stalcup, Attorney for Claimant
Brian R. Collignon, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director